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7 Attorneys for the United States of America

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 07CR2870-BTM
)	
11 Plaintiff,	)	DATE: NOVEMBER 30, 2007
	)	TIME: 1:30 p.m.
12 v.)	
)	
13 MARVIN JOVANI)	
14 CHACON-CANALES,)	
	)	GOVERNMENT'S RESPONSE AND
15	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS:
16)	
17 Defendant.	)	(1) TO COMPEL DISCOVERY;
)	
18	)	TOGETHER WITH STATEMENT OF FACTS,
	)	MEMORANDUM OF POINTS AND
19	)	AUTHORITIES AND GOVERNMENT'S
	)	MOTIONS FOR RECIPROCAL DISCOVERY
20)	

21 The United States of America, by its counsel, Karen P. Hewitt,
22 United States Attorney, and Paul S. Cook, Assistant United States
23 Attorney, hereby responds to and opposes Defendants' Motion To Compel
24 Discovery. This response and opposition is based upon the files and
25 records of the case, together with the attached statement of facts and
26 memorandum of points and authorities. The Government also hereby
27 files its Motion for Reciprocal Discovery.
28

I
STATEMENT OF FACTS

On August 8, 2007, at 1:30 a.m. a USBP Agent responded to a seismic sensor activation in the Campo, California area, approximately twenty miles east of Tecate and one mile north of the U.S./Mexico border. The Agent followed a trail of fresh footprints until he found the Defendant and four other illegal aliens hiding in the brush. The Defendant responded to the Agent's questions about his nationality, and indicated he was a Mexican citizen and national with no legal right to be in the United States. Defendant and the others were placed under arrest and transported to the Campo Border Patrol Station.

Agents subsequently determined that the Defendant was a Honduran citizen who had been most recently deported on May 11, 2007, subsequent to his conviction in January 2004 for 1st Degree Aggravated Robbery with a Deadly Weapon in Texas. The Defendant was advised of his consular notification rights and declined to have the Honduran consulate notified. Defendant was subsequently advised of his Miranda rights in Spanish. He indicated that he understood his rights and was willing to speak to the agents without an attorney present. In a recorded interview, Defendant acknowledged that he was a citizen and national of Honduras with no legal right to be in the United States. He further admitted that he had crossed the international border fence a little after midnight on August 8, 2007, and was en route to Houston, Texas. He also admitted to his prior convictions and immigration history.

II
**THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH
ITS DISCOVERY OBLIGATIONS**

The United States is aware of its discovery obligations, and will continue to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the Federal Rules of Criminal Procedure. and will continue to comply with all discovery rules. The United States has provided Defendant with 83 pages of discovery and a CD of the Defendant's post-arrest interview. Regarding the specific requests made by the Defendant, the United States responds as follows:

1. Defendant's Statements

The United States has provided a CD containing the recorded statement the Defendant made during a consensual, custodial interview by law enforcement officers, and written reports of this interview.

2. Arrest Reports and Notes

The United States has provided the reports of the federal agents who arrested the Defendant. Agent rough notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery.

A defendant is not entitled to rough notes because they are not "statements" within the meaning of the Jencks Act unless they compromise both a substantially verbatim narrative of a witness' assertions and they have been approved or adopted by the witness. United States v. Bobadilla-Lopez, 954 F.2d 519 (9th Cir. 1992); United States v. Spencer, 618 F.2d 605 (9th Cir. 1980); see also United States v. Griffin, 659 F.2d 932 (9th Cir. 1981).

1 possession in such personnel files, the information will be submitted
2 to the Court for in camera inspection and review.

3 8. Tangible Objects

4 The Government will provide copies of or an opportunity to
5 inspect all documents and tangible things material to the defense,
6 intended for use in the Government's case in chief, or seized from
7 Defendant. Although the government does not concede that the A-file
8 in its entirety is discoverable under Rule 16, it will provide an
9 opportunity for defense counsel to view it.

10 9. Expert Witnesses

11 The Government will notify Defendant of its expert witnesses
12 prior to trial, and will comply with Fed. R. Crim. P. 16(a)(1)(G).

13 10. Criminal Investigation of Any Government Witnesses

14 At this time, the Government is unaware of any criminal
15 involvement by any prospective government witness, or that any witness
16 is under investigation. Defendant's reliance on United States v.
17 Chitty, 760 F.2d 425 (2nd Cir. 1985), in support of these requests is
18 misplaced. In Chitty, the Second Circuit held that such information
19 was discoverable where the Government witness had been told he was
20 under investigation and thus had a motive to testify favorably for the
21 Government. Id. at 428.

22 Although the Government will provide conviction records, if any,
23 which could be used to impeach a witness, the Government is under no
24 obligation to turn over the criminal records of all witnesses. United
25 States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). Disclosure
26 need only extend to witnesses the Government intends to call in its
27
28

1 case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir.
2 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

3 The Government will turn over evidence within its possession
4 which could be used to properly impeach a witness who has been called
5 to testify. A defendant is not entitled, however, to any and all
6 evidence that a prospective witness is under investigation by federal,
7 state or local authorities for misconduct.

8 11. Evidence Affecting Perception, Recollection,
9 Ability to Communicate, or Truth Telling

10 The Government is unaware of any witness with perception,
11 recollection, communication, or veracity problems.

12 12. List and Addresses of Witnesses

13 The Government has provided Defendant with the investigative
14 reports relating to this crime. These reports include the names of
15 the law enforcement personnel, eye witnesses and other people
16 interviewed as part of the follow-up investigation. The Government
17 will provide Defendant with a list of all witnesses which it intends
18 to call in its case-in-chief at the time the Government's trial
19 memorandum is filed, although delivery of such list is not required.
20 See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United
21 States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v.
22 Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not
23 entitled to the production of addresses or phone numbers of possible
24 Government witnesses. See United States v. Hicks, 103 F.3d 837, 841
25 (9th Cir. 1996) ("A district court that orders the Government and the
26 defendant to exchange witness lists and summaries of anticipated
27 witness testimony in advance of trial has exceeded its authority under

1 Rule 16 of the Federal Rules of Criminal Procedure and has committed
2 error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

3 Federal Rule of Criminal Procedure 16 does not require the
4 government (or the defense) to disclose the names and addresses of
5 witnesses pretrial. Indeed, the Advisory Committee Notes reflect that
6 the Committee rejected a proposal that would have required the parties
7 to exchange the names and addresses of their witnesses three days
8 before trial:

9 The House version of the bill provides that each party, the
10 government and the defendant, may discover the names and
11 addresses of the other party's witnesses 3 days before
12 trial. The Senate version of the bill eliminates these
13 provisions, thereby making the names and addresses of a
14 party's witnesses nondiscoverable. The Senate version also
15 makes a conforming change in Rule 16(d)(1). The Conference
16 adopts the Senate version.

17 A majority of the Conferees believe it is not in the
18 interest of the effective administration of criminal
19 justice to require that the government or the defendant be
20 forced to reveal the names and addresses of its witnesses
21 before trial. Discouragement of witnesses and improper
22 contact directed at influencing their testimony, were
23 deemed paramount concerns in the formulation of this
24 policy.

25 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)
26 (quoting Rule 16 advisory committee notes) (emphasis added).

27 The Government will not provide Defendant with names and
28 addresses of witnesses it does not intend to call. The Government is
unaware of any witnesses that are favorable to the Defendant.

29 13. Jencks Act Material

30 Virtually all such material has been provided to the Defendant.
31 To the extent that other material which qualifies as a statement of
32 the witness under the Jencks Act becomes available, it will be
33 provided to the Defendant in advance of trial.

1 14. Giglio Information

2 The Government will comply with its obligations to disclose
3 impeachment evidence under Giglio v. United States, 405 U.S. 150
4 (1972). The Government is unaware of any such material at this time.

5 15. Informant Information

6 The Government will comply with this request to the extent that
7 any informants or cooperating witnesses are percipient witnesses, have
8 given Brady material to Government agents or are called by the
9 Government to testify. The Government is unaware of any informants
10 in this case.

11 16. Personnel Records of Government Officers

12 To the extent that this request is covered by the Government's
13 obligations under Henthorn, the Government will comply, but declines
14 to provide the broader spectrum of items requested here by defendant.

15 17. Training of Relevant law Enforcement Officers

16 Defendant cites no authority for such a broad request, and the
17 Government declines to provide such information as it is not required
18 by Rule 16 of the Federal Rules of Criminal Procedure.

19 18. Performance Goals and Policy Awards

20 Again, this overly broad request is not required by Rule 16 or
21 any other authority and the Government declines to provide such
22 information beyond that already provided.

23 **III**

24 THE GOVERNMENT'S MOTION FOR RECIPROCAL
 DISCOVERY SHOULD BE GRANTED

25 The discovery provided to Defendant, at her request, includes
26 documents and objects which are discoverable under Rule 16(a)(1)(E).
27 Consequently, the Government is entitled to discover from the

1 defendant any books, papers, documents, data, photographs, tangible
2 objects, buildings or places, or copies or portions of any of these
3 items that are in Defendant's possession, custody or control and which
4 Defendant intends to use in the Defendant's case-in-chief. See Rule
5 16(b)(1)(A), Fed. R. Crim. P..

6 Fed. R. Crim. P. 26.2 requires the production of prior statements
7 of all witnesses, except Defendant's. The new rule thus provides for
8 the reciprocal production of Jencks statements. The time frame
9 established by the rule requires the statement to be provided after
10 the witness has testified, as in the Jencks Act. Therefore, the
11 United States hereby requests that Defendant be ordered to supply all
12 prior statements of defense witnesses by a reasonable date before
13 trial to be set by the Court. This order should include any form
14 these statements are memorialized in, including but not limited to,
15 tape recordings, handwritten or typed notes or reports.

16 **IV**
17 **CONCLUSION**

18 For the above stated reasons, the Government respectfully
19 requests that the Defendant's motions be denied, except where
20 unopposed, and the Government's motion for reciprocal discovery be
21 granted.

22 Date: November 20, 2007.

23 Respectfully submitted,

24 KAREN P. HEWITT
25 United States Attorney

26 s/Paul S. Cook
27 PAUL S. COOK
28 Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07CR2870-BTM
)
Plaintiff,)
)
v.)
MARVIN JOVANI)
CHACON-CANALES,)
) CERTIFICATE OF SERVICE
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. John C. Lemon

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2007.

s/Paul S. Cook
PAUL S. COOK